IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

Chunni Lal **vs.** Mohd. Ishaq

S.B. Civil Second Appeal No. 221/94 against the judgment and decree dated 1.12.1993 passed by the learned Addl. District Judge No.3, Jodhpur in Civil Appeal Decree No.1/92.

Date of Judgment: May 08, 2007.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. R.R. Nagori and Mr. Alkesh Agarwal for the appellant.
Mr. R.K. Thanvi for the respondent.

BY THE COURT:

Heard learned counsel for the parties.

The appeal is against the judgments and decrees of the two courts below as the trial court vide judgment and decree dated 10.12.1991 dismissed the suit of the plaintiff's Civil Original Suit No.325/85 and the first appellate court vide judgment and decree dated 1.12.1993 dismissed the plaintiff's first appeal No.1/92.

Brief facts of the case are that the plaintiff who was in

service in Social Welfare Department as a tailoring teacher, filed the suit for eviction of his tenant-respondent on 1.6.1984 on the ground that the plaintiff is going to retire in short period and after retirement he wants to start his tailoring work/business in the suit premises. The plaintiff also stated that his one son Behari Lal has also completed his study of M.Com. and his another son Harish Chandra also completed his study upto graduation and both are unemployed and they will help the plaintiff in doing the business of tailoring in the suit shop. It is also alleged that the defendant created nuisance in the suit shop as well as the defendant is not using the suit shop for the purpose for which it was taken on rent. The plaintiff also pleaded that the defendant-tenant has materially altered the suit premises causing loss to the suit property.

The defendant contested the suit of the plaintiff by filing written statement and stated that the plaintiff's service is yet for 5-6 years more and he has no knowledge of the tailoring work and the tailoring business cannot be run in the suit shop. It is also submitted that unexperienced person cannot do the tailoring work. The defendant denied that plaintiff's sons are unemployed. According to the defendant, the plaintiff's sons are earning a lot and in view of the fact that both are well educated, therefore,

they will not do the work of tailoring. It is also submitted that the suit has been filed prematurely as the cause of action has not accrued. It is also submitted that the plaintiff's son Behari Lal has joined the service at Bombay and he does not want to come to Jodhpur for doing the said business. The second son of plaintiff Harish Chand is doing the other business. The defendant also denied other allegations of creating nuisance or material alteration or he has changed the use of the shop for other purpose.

The trial court framed seven issues. The plaintiff gave his own statement as PW-1 and produced witnesses PW-2 Pukh Raj, PW-3 Madan Lal and his son Harish Chandra as PW-4. The defendant gave his statement as DW-1 and produced the witnesses Ratan Lal (DW-2), Abdul Karim (DW-3), Mohd. Ishaq (DW-4) and Hemant Kumar (DW-5). The trial court dismissed the suit of the plaintiff on all counts after deciding all the issues against the plaintiff on the basis of which the plaintiff sought decree for eviction of the defendant-tenant vide judgment and decree dated 10.12.1992. The appellate court dismissed the regular first appeal vide judgment and decree dated 1.12.1993. Hence this second appeal.

While admitting the appeal, following substantial question of

law was framed by this Court on 4.8.1997:-

> *"Whether the courts below have adopted a wrong approach in assessing need of the premises set up by the plaintiff and the findings on this count are vitiated because of this wrong approach?*

In view of the above question, the only question for determination remained before this Court is with respect to the need of the plaintiff and for that purpose, the scope is further limited because of the reason that scope under Section 100,C.P.C. itself is limited. Therefore, this Court framed the substantial question of law that whether the courts below have adopted a wrong approach in assessing need of the plaintiff for the suit premises and because of this reason, the findings recorded by the courts below are vitiated in relation to the personal bona fide necessity of the plaintiff and about his comparative hardship and partial eviction.

The learned counsel for the appellant vehemently submitted that the plaintiff specifically pleaded that he was tailoring teacher in the Government Department. He was to retire in the year 1985, that is on 31.3.1985. The plaintiff filed the suit for eviction of his tenant on the ground of his need for doing the business of tailoring in the shop in dispute after retirement. The suit was filed

on 1.6.1984, about nine months before the time of his retirement, then in all reasonableness the courts should have believed that the person who is engaged in the work of tailoring in the government employment, can certainly and reasonably can think to start his tailoring business after his retirement. The suit could have been filed before the retirement of the plaintiff and the two courts below, instead of appreciating this fact, felt prejudiced by some irrelevant facts which are in relation to the occupation of the plaintiff's sons. This approach was absolutely erroneous inasmuch as even if the plaintiff's two sons were found engaged in other occupation or doing some other work or were found not available for helping the plaintiff even then the plaintiff's need entitled the plaintiff to seek decree for eviction of his tenant on the ground of his own need. It is submitted that from bare reading of the two judgments of the two courts below, it is clear that both the two courts below, in detail, discussed the plaintiff's sons occupation and plaintiff's one son's studies. That approach was also absolutely erroneous as well as perverse. The fact of plaintiff's one son of not completing his graduation and is doing the course of second year of three years' degree course was absolutely irrelevant because of the reason that while remaining

student, the plaintiff's son could have helped the plaintiff in the tailoring business because of the simple reason that it was the plaintiff who was to work whole time and not that the plaintiff's son was to work whole time. Therefore, the approach of the courts below so far as the need of the plaintiff as well as the roll of the plaintiff's son are concerned, was absolutely erroneously and perverse. The learned counsel for the appellant vehemently submitted that perversity in the reasons given by the first appellate court in itself is apparent on the face of the record as the first appellate court even observed that when the plaintiff is doing his tailoring business from his house then why he wants to start his tailoring business after retirement in the shop, has not been explained. It is also submitted that that fact needs no evidence because of the simple reason that by the pleadings as well as the statement of the plaintiff as well as from the evidence of the defendant, it is clear that the plaintiff was in service and, therefore, he could not have started the tailoring shop during the period of his service and after retirement, he is available to do whole time business. Therefore, the judgments of the courts below deserve to be set aside.

The learned counsel for the appellant also submitted that

doing of business by plaintiff's one son during the pendency of the suit also was irrelevant because of the reason that the plaintiff's son has not created a situation where he could not have reverted back to the tailoring business and that presumption was drawn absolutely erroneous because of the reason that the plaintiff's said son Behari Lal was not produced as witness by the plaintiff. The learned counsel for the appellants relied upon various judgment but I need not to deal with those judgments because of the reason that there is no quarrel with respect to the legal proposition that the suit can be filed even before the actual cause of action accrued to the plaintiff and on the basis of the future need, for which the learned counsel for the appellant relied upon the judgments delivered in the cases of A.P. Madhavan v. M.P. Ram Chandran (1970 All India Rent Control Journal 479), J.G. Kohli v.The Financial Commissioner (AIR P & H 107) and Mono RanjanDasgupta v. Suchitra Ganguly and others (AIR 1989 Cal. 14).

The learned counsel for the appellant also submitted that the need of the plaintiff is required to be judged as it was on the date of filing of the suit and, therefore, even if plaintiff's one of the sons has joined service then also that cannot affect the need of the plaintiff. The learned counsel for the appellant relied upon

the judgment of the Hon'ble Supreme Court delivered in the case of Kamleshwar Prasad vs. Pradumanju Agarwal (Dead) by LRs. ((1997) 4 SCC 413) and Gaya Prasad v. Pradeep Shrivastava (AIR 2001 SC 803).

The learned counsel for the appellant also submitted that Hon'ble Apex Court in the case of Jagdish Singh vs.Natthu Singh (AIR 1992 SC 1604) clearly held that when the approach of the courts below is wrong then the High Court can interfere even on question of fact determined by the courts below. It is also submitted that it appears that the courts below were under impression that the plaintiff was required to show his dire need for the suit premises and that is why the courts below observed that the plaintiff has not disclosed when he was doing business of tailoring from his house then why he wants to shift from the house to the suit shop, then that approach resulted in the dismissal of the suit. The learned counsel for the appellant relied upon the judgment delivered in the case of Dattatraya Laxman Kamble v. Abdul Rasul Moulali Kotkune & anr. (1999 RCJ 1).

The learned counsel for the respondent vehemently submitted that in fact the two courts below considered the evidence of each and every witness in detail and thereafter the

two courts below recorded finding of fact that the need of the plaintiff is only a projected need. The plaintiff deliberately suppressed relevant material facts from the court and filed the suit against the defendant because of enmity. According to the learned counsel for the respondent, the defendant gave his statement against the plaintiff's brother in a suit filed by the plaintiff's brother and, therefore, the plaintiff wanted to evict the defendant. It is also submitted that in fact the plaintiff want to increase the rent also and, therefore, the plaintiff with oblique motive, filed the suit for eviction of the defendant. Further the plaintiff's dishonest intention was taken note by the two courts below, as the plaintiff for his one need, that is for starting tailoring business filed suit against the defendant and also filed another suit against another tenant Mohd. Ishaq(name is same). The plaintiff, at this time, did not disclose that he has filed two suits for his only need, therefore, also the malafide is apparent. The learned counsel for the respondent relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Har Narain Daga v. Heeralal and others ((2000) 1 SCC 41), Sheel Chand vs. Prakash Chand (ARI 1998 SC 3063) and Ranbir Singh vs. Asharfi Lal (1995(2) RCR 534) wherein it has been held that even if

concurrent finding recorded by the two courts below is wholly erroneous even then the High Court should not interfere in such finding of fact unless it is perverse.

I considered the submissions of the learned counsel for the parties and perused the record also.

The fact which is not in dispute is that the plaintiff was in government service and according to the plaintiff, he was tailoring instructor in the government service. He was to retire on 31.3.1985. He filed the suit on 1.6.1984, a few months prior to his retirement. However, due to change in service rules, three years' service period of the plaintiff was extended and it is not in dispute that the plaintiff retired on 31.3.1988. The plaintiff let out two shops in the year 1981-82 for which the courts below observed that if there was future need of the plaintiff then the plaintiff could not have let out the shops in the year 1981-82. This approach, on the fact of it, is absolutely perverse because of the reason that the plaintiff being owner of the property, was the best judge how to manage his property and it was not expected that he will keep his shops vacant when he was not in position to utilize those shops even for one or two years. It is strange that letting out of the two shops in the year 1981-82 was considered to be an act of the

plaintiff not appropriate. Not only this, the first appellate court even observed that the plaintiff has not disclosed why he wants to do the tailoring business in the shop in dispute when he was doing his tailoring work in his house. It appears that the first appellate court did not even presume some basic facts that during service period the plaintiff could not have opened the shop for doing his own business. If the finding of the first appellate court is accepted that the plaintiff was doing tailoring business in his house then after retirement, the plaintiff, as prudent man, will certainly think to do the business for which he has experience of several years by doing the business at appropriate place and that can be only the shop. Therefore, the approach of the court below was absolutely perverse.

The two courts below further committed grave error of law by drawing absolutely erroneous inference from the evidence produced by the parties. The defendant's contention that the plaintiff's pleading that plaintiff's one son has completed his B.Com. but was found doing the B.Com., was absolutely irrelevant so far as ability to do the work with the plaintiff of tailoring by helping the plaintiff is concerned. At this juncture, we may recapitulate the facts again. The plaintiff is by-caste tailor and was

instructor in the subject of tailoring in his service period. He clearly stated that his two sons also know the work of tailoring. The plaintiff's one son who appeared in the witness box, has stated that he is student of second year B.Com but he knows the tailoring work and he used to help his father in tailoring work which was being done from the house of the plaintiff. Apart from it even if the plaintiff's son started some business or even has joined some service, cannot be ground to presume that that was done with clear intention of not to do the work with the plaintiff. Even if it is presumed that plaintiff's one son joined the service and, therefore, he would not likely to join the plaintiff even then that cannot effect the plaintiff's wok in the shop. Not only this, even if other son of the plaintiff will not help the plaintiff in the tailoring business then also it is of common knowledge that the tailoring business by a tailoring instructor can be done by himself or with the help of other persons. It cannot be demanded from the plaintiff-landlord that he should give each and every detail of minutes facts about the proposed work in the premises which he is seeking from the tenant.

In view of the above reasons, the judgment of the courts below on the question of personal bona fide necessity of the

plaintiff is not only erroneous but in fact the finding is absolutely perverse. Therefore, the findings recorded by both the courts below deserve to be set aside.

It will be worthwhile to mention here that it has come on record in evidence that the plaintiff filed one more suit against another defendant. In that suit also, it has been projected that the plaintiff's two son will do the business of tailoring and the plaintiff will help the plaintiff's sons. On the basis of this fact, the learned counsel for the respondent submitted that the plaintiff's this suit cannot be decreed when he himself has filed the suit for eviction of another tenant from another premises for the same need, then his need can be satisfied from another shop. The contention of the learned counsel for the respondent, which prevailed over the two courts below, on the face of it may be attractive, but on deep scrutiny I found that the plaintiff has proved his need in this case and he also pleaded that his two sons will do the business in another shop which is in occupation of another tenant, then the plaintiff cannot be denied possession of both the shops. The plaintiff's other suit filed against another tenant (the name of another tenant is same, that is Mohd. Ishaq) but that suit was dismissed by the trial court as well as the appellate court then the

mere filing of the suit by the plaintiff against one of the tenants for his eviction was not material when the trial court and the first appellate court decided the plaintiff's suit and appeal. The courts below should have considered the need of the plaintiff on the basis of evidence available on record of the case and could have taken into consideration the fact of filing of two suits by the plaintiff for one need while assessing the bona fide need of the plaintiff. The facts mentioned above, in detail that under what circumstances, the plaintiff is seeking eviction of the tenant on the ground personal bona fide necessity, this cannot be said that that need can be said to be not bona fide merely because the plaintiff was not clear for which shop he may get the decree for eviction of the tenant. It would have been better that the plaintiff would have disclosed complete facts in both the suits if filed on the same day and if not filed on the same day then his intention to file another suit during pendency of previously instituted suit and his filing of the suit should have been mentioned in the subsequently filed suit but that fact alone is not sufficient to hold that the need of the plaintiff was not bona fide. At the most it can be said that he was not properly advised.

In view of the above reasons, the finding of the courts below

on issue no. 1 is set aside.

The learned counsel for the respondent submitted that now by this time, the plaintiff is old one and, therefore, he cannot do the work of tailoring. The plaintiff cannot be made to suffer because of the time consumed in the court proceedings only. The plaintiff proved his need as on the date when he filed the suit. The plaintiff since found to be in bona fide need of the suit shop and the reason given by the court below that the plaintiff cannot do business of tailoring is rejected then the the plaintiff has no other accommodation except the shop in dispute where he can do the business. The plaintiff will suffer a greater hardship if the plaintiff is not allowed to occupy the suit shop by passing decree against the tenant. The courts below while deciding the issue of comparative hardship also committed serious error of law by holding that the defendant will suffer greater hardship because his business is established in the suit shop since last 16 years and he has family of 10 members. In any case where the plaintiff's need is found bona fide then natural consequence is that the tenant will have to vacate the rented premises and in that process he may suffer some hardship and unless proved otherwise it cannot be presumed that hardship can be greater hardship than hardship of

the plaintiff. Here in this case, the plaintiff who retired in the year 1988 wants to do his business in the shop and if he is not allowed to occupy the shop then certainly he is likely to suffer greater hardship as he will have to make all other arrangements for his business and for that purpose, he will have to pay more from his own pocket. In totality, it is a case of greater hardship in case decree of eviction of the tenant is not passed.

In view of the fact that the trial court clearly observed that the witnesses of both the plaintiff and the defendant clearly admitted that there is no possibility of partial eviction of the suit premises because of the reason that if the suit premises is divided, then neither the need of the plaintiff can be met nor the defendant's need can be fulfilled from the part of the suit premises, it is held that the plaintiff is entitled to decree for eviction for entire shop.

In view of the above reasons, the appeal of the appellant deserves to be allowed and hence allowed and the substantial question of law is decided in favour of the appellant. The judgment and decree of the trial court dated 10.12.1991 as well as judgment and decree of the first appellate court dated 1.12.1993 are set aside. The suit of the plaintiff is decreed for eviction of the

tenant on the ground of personal bona fide necessity of the plaintiff for the suit premises.

Since the defendant is in possession of the suit shop since long and that fact has been recorded by both the two courts below in detail and is admitted fact that the suit premises is commercial premises, therefore, the eviction shall not be executed till 31.5.2008. Therefore, it is ordered that in case, the tenant-respondent furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 31.5.2008 and shall not part with the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decretal amount, if due, and shall also pay the rent up to 31.5.2008 (in advance) within a period of two months from today before the trial court or directly to the landlord, the the decree shall not be executed till 1.6.2008.

In case of non-compliance of the order or default in payment of amount mentioned above, the decree for eviction of the tenant shall become executable forthwith.

(PRAKASH TATIA),J.